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IN THE

# Supreme Court of the United States

OCTOBER TERM 1968

NO. ~~692~~ 42

HOWARD ROSS and BERNARD ROSS, as Trustees for LENA ROSENBAUM,

*Petitioners,*

—v.—

ROBERT A. BERNHARD, *et al.*,

*Respondents,*

and

PAUL L. DAVIES, *et al.*,

*Defendants.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## BRIEF FOR PETITIONERS

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IN THE

# Supreme Court of the United States

**October Term 1968**

No. 992

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HOWARD ROSS AND BERNARD ROSS, AS TRUSTEES FOR LENA ROSENBAUM,

*Petitioners,*

—v.—

ROBERT A. BERNHARD, *et al.*,

*Respondents.*

and

PAUL L. DAVIES, *et al.*,

*Defendants.*

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## BRIEF FOR PETITIONERS

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### Opinions Below

The opinion of the Court of Appeals for the Second Circuit is reported at 403 F.2d 909. The opinion of the District Court for the Southern District of New York is reported at 275 F. Supp. 569.

### Jurisdiction

The judgment of the Court of Appeals herein was entered on November 1, 1968 (A. 2). The petition for a writ of certiorari was filed on January 29, 1969 and was granted March 24, 1969. This Court's jurisdiction is based

on 28 USC § 1254(1). The jurisdiction of the Court of Appeals was based on 28 USC § 1292(b), that Court having accepted a certification from the District Court. The District Court's jurisdiction was based upon the Investment Company Act of 1940, 15 USC §§ 80a-1, et seq.

## Constitutional Provisions and Statutes

Seventh Amendment to the Constitution:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

Section 44 of the Investment Company Act of 1940, 15 USC § 80a-43:

> "Sec. 44. The district courts of the United States and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have jurisdiction of violations of this title or the rules, regulations, or orders thereunder, and, concurrently with State and Territorial courts, of all suits in equity and actions at law brought to enforce any liability or duty created by, or to enjoin any violation of, this title or the rules, regulations, or orders thereunder . . ."

## Question Presented

When a corporate action to recover money entitles all parties to a jury trial, is the jury right lost where the corporation is compelled to seek relief at the instance of a stockholder in a derivative action?

## Statement of the Case

This is an action brought by stockholders of The Lehman Corporation in its right and on its behalf. It is brought under the Investment Company Act of 1940, 15 USC §§ 80a-1, et seq. The amended complaint alleges that the Corporation, under the control of its broker, Lehman Brothers, has paid illegal and unnecessary brokerage commissions to Lehman Brothers (A. 22-26). The plaintiffs made timely demand for a jury trial (A. 20). Pre-trial discovery was completed, plaintiffs filed a note of issue and the action was placed upon the trial calendar (A. 31). Defendants then moved to strike plaintiffs' demand for jury trial and to transfer the case to the non-jury calendar (A. 28). The District Court denied defendants' motion, but certified the question to the Court of Appeals for the Second Circuit (A. 51-52), which accepted the certification (A. 57). The Second Circuit, in a two-to-one opinion, reversed the District Court. 403 F.2d 909.

## *ARGUMENT*

### I.

**Plaintiffs are constitutionally entitled to a jury trial in a derivative stockholders action if a right to jury trial would exist were the underlying cause of action brought directly by the corporation.**

The right to jury trial in civil actions, guaranteed by the Seventh Amendment, has been jealously safeguarded by this Court.

> ". . . 'Maintenance of the jury as a fact finding body is of such importance and occupies so firm a

> place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.' " *Beacon Theatres, Inc.* v. *Westover,* 359 U.S. 500, 501 (1959).

In so holding, the Court re-affirmed the importance of the institution of the civil jury as a democratic check upon the power of the judiciary. See *Parsons* v. *Bedford,* 28 U.S. (3 Pet.) 433, 446 (1830); Waterman, *Thomas Jefferson and Blackstone's Commentaries,* 27 Ill. L. Rev. 629, 643 (1933); Hogan, *Joseph Story on Juries,* 37 Ore. L. Rev. 234, 235 (1958); 3 *Elliott's Debates,* 324, 554 (1836).

Mr. Justice Holmes explained how the jury system's guarantee of popular participation in the judicial process operates:

> "Indeed one reason why I believe in our practice of leaving questions of negligence to them [the jury] is what is precisely one of their gravest defects from the point of view of their theoretical function: that they will introduce into their verdict a certain amount —a very large amount, so far as I have observed—of popular prejudice, and thus keep the administration of the law in accord with the wishes and feelings of the community." (Holmes, *Law In Science and Science in Law,* 12 Harv. L. Rev. 443, 459-60 (1899); interpolation added.)

In our "People's Capitalism" embracing 27 million stockholders of public corporations the applicability of the conception of popular control to the derivative action is especially compelling.

The Seventh Amendment preserves the right of trial by jury "In Suits at common law"; not to suits in equity. The Court of Appeals below held that a stockholder's

derivative action is "a creature of equity" to which the right of a jury trial does not apply. 403 F. 2d at 911.

That the derivative stockholder's action is an invention of equity may be conceded. However, the proposition states only a half truth. A derivative action is constituted of two parts. The first part concerns the shareholder's right to maintain the action on behalf of the corporation. This is a procedural mechanism of equity. The second part is the underlying claim of the corporation asserted in the action. This claim may be either legal or equitable depending upon its nature. *Koster* v. *Lumbermens Mutual Cas. Co.*, 330 U.S. 518, 522-23 (1947); *Meyer* v. *Fleming*, 327 U.S. 161, 168 (1946).

Prior to the union of law and equity, an equity court, once having taken jurisdiction, would proceed to final adjudication of all issues, legal and equitable, in the suit. There was no practical alternative. Trying one half of the case (the right of the stockholders to hail the corporation into Court) in equity, while sending the other half (the corporation's claims against defendants) to another judge sitting on the law side, had little appeal against considerations of litigative efficiency.

The adoption of the Federal Rules of Civil Procedure in 1938 worked an historical change by merging law and equity into a single unified system. The artificial restraints of the old system were eliminated. It now became possible for a litigation to be tried before a single judge sitting at once as a law court trying the legal issues with a jury if demanded, and an equity court trying the equity issues.

The Court of Appeals below reached its result by utilizing pre-merger concepts: It noted that a derivative action,

under the pre-unified system, would have had to be instituted in equity and an equity court would have decided the entire case without reference to a jury. Therefore, it held, no right to trial by jury is ever present in a stockholder's derivative action, even though the underlying corporate claim be legal.

This Court, however, rejected just such a test in *Beacon Theatres, Inc.* v. *Westover,* 359 U.S. 500 (1959). There plaintiff sought an injunction and defendant counterclaimed for treble damages under the antitrust laws. The lower court held that the suit under the pre-merger system would have been cognizable in equity and therefore denied a jury on the counterclaim. This court reversed, holding that, if legal claims were present, a jury was required; the blending of legal and equitable claims, which formerly would have resulted in exclusively equity jurisdiction, does not now destroy the right to a jury trial of the legal issues:

> ". . . Since in the federal courts equity has always acted only when legal remedies were inadequate, the expansion of adequate legal remedies provided by the Declaratory Judgment Act and the Federal Rules necessarily affects the scope of equity. Thus, the justification for equity's deciding legal issues once it obtains jurisdiction, and refusing to dismiss a case, merely because subsequently a legal remedy becomes available, must be re-evaluated in the light of the liberal joinder provisions of the Federal Rules which allow legal and equitable causes to be brought and resolved in one civil action." (359 U.S. at 509; footnote references eliminated.)

In *Dairy Queen, Inc.* v. *Wood,* 369 U.S. 469 (1962), this Court emphatically reaffirmed its holding in *Beacon Theatres.* In *Dairy Queen,* the complaint alleged that the

defendant was infringing the plaintiff's trademark and had breached a licensing agreement between the parties; it sought an injunction and an accounting. These were all, traditionally, "equitable" claims—just as the stockholder's derivative action is traditionally "equitable". Nonetheless, this Court held that, since money recovery was also sought, the right to jury trial is not destroyed. The Court stated:

> ". . . The holding in Beacon Theatres was that where both legal and equitable issues are presented in a single case, 'only under the most imperative circumstances, circumstances which in view of the flexible procedures of the Federal Rules we cannot now anticipate, can the right to a jury trial of legal issues be lost through prior determination of equitable claims.' That holding, of course, applies whether the trial judge chooses to characterize the legal issues presented as 'incidental' to equitable issues or not. Consequently, in a case such as this where there cannot even be a contention of such 'imperative circumstances,' Beacon Theatres requires that any legal issues for which a trial by jury is timely and properly demanded be submitted to a jury. There being no question of the timeliness or correctness of the demand involved here, the sole question which we must decide is whether the action now pending before the District Court contains legal issues." (369 U.S. at 472-73; footnote references eliminated.)

The *Dairy Queen* respondents attempted to qualify the rule by quantitative considerations. They contended that the equitable issues outweighed the legal issue, which was a mere incident to the equitable one. Without disputing the premise, this Court refused to weaken the right to a jury trial by the disintegrating erosion of particular exceptions.

> "'It is therefore immaterial that the case at bar contains a stronger basis for equitable relief than was present in Beacon Theatres. It would make no difference if the equitable cause clearly outweighed the legal cause so that the basic issue of the case taken as a whole is equitable. As long as *any* legal cause is involved the jury rights it creates control. This is the teaching of Beacon Theatres, as we construe it.' Thermo-Stitch, Inc. v. Chemi-Cord processing Corp. (CA5 Fla.) 294 F. 2d 486, 491." (369 U.S. at 473 n.8; emphasis added)

In the present case the Court of Appeals denied the right to a jury because "the assertion of any 'legal' claim on behalf of the corporation is totally *dependent* upon plaintiffs' successfully establishing their capacity to sue at equity. Thus in applying the Seventh Amendment the two portions of the complaint cannot be regarded as separable and divisible." (403 F. 2d at 914; emphasis supplied).

But this effort to distinguish this Court's holdings in *Beacon Theatres and Dairy Queen* does not withstand analysis. For the holding of these cases is that, where both legal and equitable issues are presented in a single case, the right to a jury trial must not be lost by the way in which "the trial judge chooses to characterize the legal issues" (*Dairy Queen, supra,* 369 U.S. at 473). In *Dairy Queen,* the trial court denied a jury, denigrating the legal issue by characterizing it as merely "incidental" to the equitable issue (369 U.S. 469, 470). In the present case, the Court of Appeals rationalizes denial of a jury by referring to the legal issues as "dependent" on the equitable issues. But, however the legal issues be labeled, there *is* a legal issue here. This is not questioned by the Court below.

And this Court has laid down the rule in terms so broad as to reject semantic erosion: "only under the most imperative circumstances . . . can the right to a jury trial of legal issues be lost through prior determination of equitable claims" *Beacon Theatres, supra* (359 U.S. at 510-511).

If indeed the right to a jury trial should depend on such elusive and unfunctional a concept as would require balancing the weight of the equity claim against that of the law claim, it is nevertheless plain that the dominant claims in this case as in most derivative cases are the underlying corporate claims. The fact that equity has fashioned a remedy which enables any shareholder of a corporation, immobilized by recreant directors, to rescue the corporation and bring it to the courthouse should not deprive the corporation or, for that matter, the defendants, of their right to a jury trial.

Thus, this Court has recognized that the important issue in stockholders' derivative actions is not the equitable question of whether the particular stockholder is entitled to maintain the action but, rather, the underlying substantive claim against the defendants. "The cause of action which such a [derivative] plaintiff brings before the Court is not his own but the corporation's. It is the real party in interest and he is allowed to act in protection of its interest somewhat as a 'next friend' might do for an individual, because it is disabled from protecting itself"; *Koster* v. *Lumbermens Mutual Cas. Co.*, 330 U.S. 518, 522-3 (1947). "The fact that [in a stockholder's derivative action] the corporation is nominally a defendant . . . gives the suit only a difference in form, not a difference in substance"; *Meyer* v. *Fleming*, 327 U.S. 161, 168 (1946).

Moreover, the emphasis of the Court below on the dependence of the legal claim is misplaced, for the underlying legal cause of action could have been brought directly by the corporation. The action is thus no more or less "unitary" (403 F.2d at 914) than the *Beacon Theatres* suit. Once the plaintiff in that case filed its bill in equity, the anti-trust claim became completely dependent thereon, incapable of prosecution as a separate action, since it was a compulsory counterclaim. *Moore* v. *New York Cotton Exchange*, 270 U.S. 593, 609-10 (1926).

The consequences of the Court of Appeals holding lead to intolerable results. If a director, broker or other person is sued by a corporation to recover a sum of money, he is entitled to a jury trial. If the same defendant is sued to recover the same sum of money by the same corporation, but the corporation is propelled by a shareholder in a derivative action, two possible alternatives result from the Court of Appeals holding: Either the defendant has lost his right to a jury trial, or, by insisting upon it, he can defeat the action altogether.* Either result is logically untenable and procedurally uncalled for. Granting such a defendant a jury trial on the legal issues comports not only with logic, but with precedent as well. For the rights of the parties cannot be made to depend on the procedural question of how the corporation came to sue the defendant:

---

* The latter result occurred prior to the merger of law and equity. *Fleitmann* v. *Welsbach Street Lighting Co.*, 240 U.S. 27 (1916), discussed *infra*, pp. 12-13. The Court of Appeals would return us to that era, ignoring the solution provided by the Federal Rules in permitting legal issues to be tried to the jury while the court decides equitable issues. See *Fanchon & Marco, Inc.* v. *Paramount Pictures, Inc.*, 202 F. 2d 731 (2 Cir. 1953), discussed *infra*, pp. 12-13.

> ". . . [T]he essential character of a cause of action belonging to a corporation remains the same, whether the suit to enforce it be brought by the corporation or by a share-holder. Thus a legal right of action would not be treated as an equitable one, or become governed by the rules applicable to equitable causes of action, as to limitations, etc., because a share-holder has brought suit in equity to enforce it on behalf of the company." *Potter* v. *Walker*, 276 N.Y. 15, 27, 11 N.E. 2d 335 (1937).

The exact issue passed upon by the Court below was decided in 1963 by the Ninth Circuit in *DePinto* v. *Provident Security Life Insurance Co.*, 323 F.2d 826 (9 Cir. 1963), cert. den. 376 U.S. 950, reh. den. 383 U.S. 973. In *DePinto*, the Court held that the right to a jury trial must be preserved in a stockholder's derivative action where such right would have existed had the suit been brought by the corporation in the first instance. The Court stated:

> "Thus, except under most imperative circumstances, a right to a jury trial on legal issues may not now be denied to a federal litigant on the ground that the case reached court only through equity, or because equitable rights are involved, or because the legal issues are 'incidental' to the equitable issues, or because substantive equitable remedies are sought, or by the device of trying the equitable issues first.
>
> "A stockholder's derivative action is an invention of equity to supply the want of an adequate remedy at law to redress breaches of fiduciary duty. Koster v. Lumbermens Mutual Casualty Co., 330 U.S. 518, 522, 67 S.Ct. 828, 91 L. Ed. 1067. The aid of equity is needed in order to establish the shareholder's right to sue in the corporate stead. Fanchon & Marco, Inc. v. Paramount Pictures, Inc., 2 Cir., 202 F. 2d 731,

734, 36 A.L.R. 2d 1336. But the claim set up is that of the corporation.

"In order to determine whether appellants were entitled to a jury trial in this derivative action, it is therefore necessary to ascertain whether any of the claims asserted against them on behalf of the corporation are of a kind which, if asserted by the corporation, would be cognizable in a suit at common law. If so, and if the judgment which has been entered, insofar as can be determined rests on claims of that kind, there has been a denial of trial by jury as guaranteed by the Seventh Amendment and appellants have been aggrieved thereby." (323 F. 2d at 836-37; footnote references eliminated)

In *Fanchon & Marco, Inc.* v. *Paramount Pictures, Inc.*, 202 F.2d 731 (2 Cir. 1953), the Court of Appeals held that in a derivative action where the underlying cause of action charges violation of the antitrust laws, there is a right to a jury trial which is not destroyed by the fact that the action is brought derivatively:

". . . The two major issues of right of the shareholder to sue and of violation of the antitrust laws causing damage to the corporation can be tried side by side or otherwise as may be convenient; that one may go to the jury while the other does not causes no difficulty." (202 F. 2d at 735)

The Court of Appeals here thought that the holding in *Fanchon* was dictum. Clearly, it was not. The defendants there had successfully obtained dismissal of the action by the District Court. They argued that they were entitled to a jury trial and that under the rationale of *Fleitmann* v. *Welsbach Street Lighting Co.*, 240 U.S. 27 (1916), decided prior to the merger of law and equity, a jury trial was not

available in a derivative stockholders' action. This, it was urged, required dismissal of the action. The Court of Appeals in *Fanchon* held, however, that the *Fleitmann* rationale did not apply to a merged system of law and equity since the derivative action could be maintained while still preserving defendants' right to a jury trial.

The Court below sought to distinguish *Fanchon* in that the underlying claim there was for treble damages under the antitrust laws. Thus, said the Court of Appeals, the jury trial right was statutory in *Fanchon* whereas here it is constitutional. This attempt at distinction misses the mark. In the first place, the right to a jury in an antitrust action is not provided by the statute but results simply from the fact that — as in the present case — a money judgment for damages may result. If the availability of such a judgment means that the statute contemplates a jury trial, then it must be said that § 44 of the Investment Company Act, 15 USC § 80a-43, which authorizes actions at law to enforce liabilities created by the Act, similarly confers a jury right. More importantly, however, it is difficult to see how a statutorily created right relating to the underlying cause of action could achieve greater sanctity than a similar constitutionally provided one. In short, the *Fanchon* case is not distinguishable from the present one.

A legal claim of a corporation, even though advanced in a derivative action, is triable before a jury. This Court has consistently rejected a variety of efforts to permit formalism to triumph over the substantive constitutional right to trial by jury.

## II.

**The underlying causes of action in the present case assert substantial legal claims giving rise to a right to jury trial.**

As this Court held in *Dairy Queen, Inc.* v. *Wood*, 369 U.S. 469, 473n.8 (1962), "As long as any legal cause is involved the jury rights it creates control." In the present case the District Court found much more than the minimal requirement. It found "that this complaint states on behalf of the corporation a claim which is fundamentally legal rather than equitable." 275 F. Supp. 569, 571. The Court of Appeals decision makes no finding to the contrary.

The Complaint seeks a money recovery: brokerage commissions illegally paid by the Corporation, most of it to Lehman Brothers, which dominated the Corporation. In 1964 the Corporation paid brokerage commissions of $531,724. Of this sum $442,903 was paid to Lehman Brothers. Similarly, in 1965, the Corporation paid brokerage commissions of $538,622, of which $334,685 went to Lehman Brothers. Similar payments for 1966 were $405,772 and $351,640, respectively (A. 33). The defendants include, in addition to the directors of the Corporation, the partners of Lehman Brothers (A. 21).

The claims may be broken down as follows:

(1) Failure to utilize the third market. In order to generate commissions for themselves, Lehman Brothers caused the Corporation to execute transactions in listed securities on the New York Stock Exchange. These transactions could have been executed instead on the third market at more favorable prices, but such executions would not have resulted in commissions to Lehman Brothers (A. 23).

(2) Payment of unnecessary commissions to Lehman Brothers on over-the-counter transactions. When effecting transactions in unlisted securities, Lehman Brothers caused the Corporation needlessly to interpose themselves and to pay them unnecessary commissions. Instead, the Corporation could have dealt directly with principals and avoided those gratuitous payments for which no service of value was rendered (A. 23-24).

(3) Reciprocal brokerage. The Corporation has been caused to pay brokerage commissions to brokers who supplied information to Lehman Brothers. This effectively caused the Corporation to pay third parties for advice for which the Corporation had already paid Lehman Brothers (A. 24-25).

Several theories are asserted by which recovery may be had. It is asserted that, by virtue of the domination and control of the Corporation by Lehman Brothers, all brokerage commissions paid by the Corporation to Lehman Brothers are illegal under §§ 10(b) (1), 2(a) (3) and 2(a) (9) of the Investment Company Act, 15 USC §§ 80a-10(b) (1), 2(a) (3), 2(a) (9) (A. 25-26). It is also asserted that the reciprocal brokerage constitutes compensation to Lehman Brothers as investment adviser to the Corporation in excess of the amount specified in its investment advisory contract, thus breaching the investment advisory contract and violating the Investment Company Act (A. 25).

It is further asserted that the payment of brokerage commissions to Lehman Brothers and other brokers has constituted an unlawful and willful conversion by Lehman Brothers of the assets of the Corporation in violation of § 37 of the Act (A. 26). The payment of these brokerage commissions is also alleged to constitute gross abuse of trust, gross misconduct, willful misfeasance, bad faith,

gross negligence and a reckless disregard of fiduciary duties by the Corporation's officers, directors and brokers in violation of the Act (A. 26). Finally, it is asserted that the payments amount to a waste and spoliation of the Corporation's assets (A. 26).

The prayer for relief demands that the defendants be required "to account for and pay to the Corporation for their profits and gains and its losses." No injunctive or other extraordinary relief is sought (A. 27).

That causes of action seeking money recovery such as breach of contract, conversion, gross negligence and violation of statutory provisions are legal rather than equitable in nature is beyond question. Professor Moore states: "Actions which at common law . . . are jury actions . . . are: . . . suits for damages for negligence . . . for violation of . . . statutes . . . trover to recover damages for conversion of personal property . . . and special assumpsit — to recover damages on a simple contract." (5 Moore's Fed. Pr. 113-115 (1968), footnotes omitted).

In *DePinto, supra,* the Court held as follows:

> ". . . One ground for the judgment, applicable to all of the appellants, is gross negligence. Another ground, applicable to all appellants except Landoe, is breach of fiduciary duty.
>
> "An action brought by the corporation to recover damages against former officers or directors on the ground of negligence would be cognizable in a suit at common law. Kelly v. Dolan, 3 Cir., 233 F. 635. Thus all appellants were denied a jury trial on an issue cognizable in a suit at common law. Landoe was necessarily aggrieved by this denial since, as to him, this was the only basis of the judgment.
>
> * * * * *

> "Having in mind the necessity of scrutinizing, with utmost care, any seeming curtailment of the right to a jury trial, we hold that where a claim of breach of fiduciary duty is predicated upon underlying conduct, such as negligence, which is actionable in a direct suit at common law, the issue of whether there has been such a breach is, subject to appropriate instructions, a jury question. We therefore conclude that, in the context of this case, the question concerning breach of fiduciary duty, as well as negligence, should have been submitted to the jury." (323 F. 2d at 836-37; footnote references eliminated)

In the *DePinto* case, the claim involved the diversion of corporate assets in the purchase of allegedly worthless stock. Grounds for the judgment were gross negligence and breach of fiduciary duty. In the instant case the amended complaint asserts that assets of the Corporation have been diverted. The diversion is in the form of brokerage commissions, which are paid to Lehman Brothers and other brokers. As in *DePinto,* the diversion is caused by gross negligence and breach of fiduciary duty.

The present case seeks not only to charge the directors of the Corporation, but also asks for recovery from the Corporation's principal broker. In *Simler* v. *Conner*, 372 U.S. 221 (1963), this Court held that a case adjudicating the amount of fees which a client was obligated to pay his lawyer, whom he charged with overreaching, raised legal issues creating a right of jury trial. Clearly a controversy with a broker concerning the propriety of commissions paid to him is also a legal cause of action. *Schultz* v. *Manufacturers & Traders Trust Co.,* 128 F. 2d 889 (2 Cir. 1942), cert. den. 317 U.S. 674; Restatement of Agency 2d, Secs. 399 et seq.

The mere fact that the defendants are fiduciaries does not mean that the causes of action against them must be equitable. Thus, as the Court of Appeals for the Third Circuit held in *Kelly* v. *Dolan*, 233 F. 635, 637 (3 Cir. 1916):

> ". . . That the negligence of a director is an injury to his corporation, and that the right to recover for such negligence is a legal as contrasted with an equitable right, and that the corporation is vested with the right to recover for such injury, is established by authority. In some cases this right is asserted in equity; in some at law, according to circumstances; but in whatever form it is litigated the right to recover for negligence is a legal right."

See also, *Halladay* v. *Verschoor*, 381 F. 2d 100, 109 (8 Cir. 1967).

Nor does the possibility that the transactions may be numerous require a denial of the jury right. There is no reason to believe that the jury would not be equal to its role. The issues are considerably simpler than those involved in antitrust litigation, patent suits and a large variety of truly complex matters where juries are called upon to examine numerous transactions constituting the wrongs complained of. There is no justification for eroding the right to a jury trial here.

The mainstream of American political and jurisprudential thought has not shared the doubts of Alexander Hamilton as to the competence of juries, relied upon by respondents (Br. in Opp. to Pet. for Cert., p. 7).* Thus, in

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* "Hamilton's view, that constitutional protection of jury trial in civil cases was undesirable, did not prevail. On the contrary, in response to widespread demands from the various State Constitutional Conventions, the first Congress adopted the Bill of Rights containing the Sixth and Seventh Amendments, intended to save trial in both criminal and common law cases from legislative or judicial abridgement." *Galloway* v. *United States*, 319 U.S. 372, 396, 398 (1943; dissenting opinion).

*Sioux City & Pacific R.R.* v. *Stout,* 84 U.S. 657, 664 (1873), the Court said:

> ". . . Twelve men of the average of the community, comprising men of education and men of little education, men of learning and men whose learning consists only in what they have themselves seen and heard, the merchant, the mechanic, the farmer, the laborer; these sit together, consult, apply their separate experience of the affairs of life to the facts proven, and draw a unanimous conclusion. This average judgment thus given it is the great effort of the law to obtain. It is assumed that twelve men know more of the common affairs of life than does one man; that they can draw wiser and safer conclusions from admitted facts thus occurring, than can a single judge."

See also *Travelers Insurance Co.* v. *Selden,* 78 Fed. 285, 287 (4 Cir. 1897); Crane, *Judge and Jury,* 15 A.B.A.J. 201, 202 (1929); Caldwell, *Trial by Judge and Jury,* 33 Am. L. Rev. 321, 329-38 (1899); Tongue, *In Defense of Juries As Exclusive Judges of the Facts,* 35 Ore. L. Rev. 143, 161-66 (1956).

What is sought by way of relief here is a judgment for a sum of money. As this Court held in *Dairy Queen, supra,* this is the determinative factor. No extraordinary relief for which courts of law are inadequate is required, notwithstanding the fact that the prayer uses the word account.

> "The respondents' contention that this money claim is 'purely equitable' is based primarily upon the fact that their complaint is cast in terms of an 'accounting,' rather than in terms of an action for 'debt' or 'damages.' But the constitutional right to trial by jury cannot be made to depend upon the

> choice of words used in the pleadings. The necessary prerequisite to the right to maintain a suit for an equitable accounting, like all other equitable remedies, is, as we pointed out, in Beacon Theatres, the absence of an adequate remedy at law. Consequently, in order to maintain such a suit on a cause of action cognizable at law, as this one is, the plaintiff must be able to show that the 'accounts between the parties' are of such a 'complicated nature' that only a court of equity can satisfactorily unravel them. In view of the powers given to District Courts by Federal Rule of Civil Procedure 53(b) to appoint masters to assist the jury in those exceptional cases where the legal issues are too complicated for the jury adequately to handle alone, the burden of such a showing is considerably increased and it will indeed be a rare case in which it can be met. But be that as it may, this is certainly not such a case. A jury, under proper instructions from the court, could readily determine the recovery, if any, to be had here, whether the theory finally settled upon is that of breach of contract, that of trademark infringement, or any combination of the two. The legal remedy cannot be characterized as inadequate merely because the measure of damages may necessitate a look into petioner's business records." (*Dairy Queen, Inc.* v. *Wood*, 369 U.S. 469, 477-79; footnote references eliminated)

See also, *Swofford* v. *B &W, Inc.*, 336 F.2d 406, 410-11 (5 Cir. 1964), cert. den. 379 U.S. 962.

## CONCLUSION

**For the foregoing reasons, the judgment of the Court of Appeals for the Second Circuit should be reversed.**

Respectfully submitted,

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